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NO. 09-815

IN THE

SUPREME COURT OF THE UNITED STATES

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE AND ROBERT PIRKLE,

Petitioners,

VS.

AMERICAN AIRLINES, INC.

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals,
Second District Of Texas, Fort Worth

BRIEF FOR RESPONDENT IN SUPPORT OF PETITION FOR WRIT

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CORPORATE DISCLOSURE STATEMENT

Main St. Travel Center of Monsey, Inc. does not have a parent corporation, nor does any company own more than 10% of its stock. Main St. is not a publicly traded company.

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, Main St. Travel Center of Monsey, Inc., a defendant and counterplaintiff in the court below, respectfully submits this response in support of the petition for writ of certiorari filed by Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle (hereafter collectively "Frequent Flyer Depot"), in *Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle v. American Airlines, Inc.,* No. 09-815. Frequent Flyer Depot seeks review of the decision of the Texas Supreme Court which affirmed a lower court ruling that only claims made against air carriers are preempted by 49 U.S.C. § 41713. This response is being submitted within 20 days of Frequent Flyer Depot's petition having been docketed on January 8, 2010.

STATEMENT

As explained in more detail in the Petition, this matter involves a challenge by an airline to the scope of the preemptive provisions of the Airline Deregulation Act (ADA, or as sometimes referred to herein, "The Act.") For the reasons stated herein, the Petition presents an opportunity for this Court to clarify the scope of preemption under the ADA by

clarifying 1) whether preemption is determined by the identity of the litigants, or the subject matter of the claims; 2) to provide much needed guidance to the lower courts in articulating a test for determining when a state claim significantly impacts rates, routes, and services of an airline such that same is preempted, but is not too tenuous or remote as to avoid preemption; and 3) to determine whether the comprehensive administrative remedies promulgated by Congress providing air carriers' ability to bring administrative complaints against ticket agents indicates that Congress intended to preempt matters within the scope of available administrative remedies.

American Airlines (American) brought various state law claims against a variety of defendants, including appointed ticketing agents, non-appointed ticketing agents, and rewards members. (Pet. App. 31A-32A, 42A, 44A-45A) (Brief App. 2A-3A)[1]. Main St. is one such defendant that has been sued for selling, arranging for, pricing, and booking travel, and issuing tickets for air travel services to be provided by an air carrier. (Pet. App. 31A) (Brief App. 16A-18A ¶¶ 78-85). American claims that it provided such travel and was harmed. (Pet. App. 32A ¶ 2). American seeks, through the application of state tort law, to impose restrictions on the sale and pricing of

1 References to "Pet. App." refer the Court to the appendix attached to the Petition for Review; References to "Brief Pet." refer the Court to the appendix attached hereto.

the services of an air carrier that may provide air transportation under the Airline Deregulation Act.[2] (*See* Pet. App. 32A at ¶ 2, 50A at ¶ 2).

49 U.S.C. § 41713(b) preempts state action in enforcing state created remedies that relate to the prices, routes, or services of an air carrier that may provide air transportation:

> (1) Except as provided in this subsection, a State . . . may not . . . enforce a law . . . or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1) (2008)

In the courts below, the petitioning parties argued that American's causes of action relate to "a

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2 Commonly referred to as the ADA, the predecessor provision prohibited states from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier[.]" Former 49 U.S.C.App. § 1305(a)(1). When it reenacted the preemption provision as 49 U.S.C. § 41713(b)(1), Congress intended to make no substantive change. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222-23 & n. 1, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) (citing Pub.L. 103-272, § 1(a), 108 Stat. 745).

price, route, or service of an air carrier" and are therefore preempted. American asserted that preemption is determined by the identity of the litigants, rather than the subject matter of the claims, and therefore claims made by air carriers are not within the preemptive scope of the ADA. (Brief App. 21A).

Despite nearly twenty years of ADA jurisprudence, there remains substantial conflict among the courts as to whether the ADA preempts only claims brought against air carriers, (but not claims made by air carriers) so that preemption turns on the identity of the litigants, rather than the subject matter of the claims. The Texas court in this case held that "any attempt by [a carrier] to enforce via state law its own standards as to prices, routes, or services, including frequent flyer credits, is not preempted as impermissible state regulation." *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215 (Tex. App. --Fort Worth 2009, pet. denied). This case presents an opportunity for this Court to resolve and clarify that the touchstone for preemption under 49 U.S.C. § 41713 is the subject matter of the claims being asserted, not the identity of the litigants.

Likewise, this case presents an opportunity for the Court to establish factors to consider in determining whether a claim meets the significant

impact test for preemption, such that the claim is not too tenuous or remote to invoke preemption under the ADA.

Finally, this case presents an opportunity for the Court to to determine whether the comprehensive administrative remedies promulgated by Congress allowing air carriers to bring administrative complaints against ticket agents, indicates that Congress intended to preempt matters within the scope of available administrative remedies.

REASONS FOR SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

In its petition, Frequent Flyer Depot questions whether the Texas Courts erred in narrowly construing 49 U.S.C. § 41712 and 49 U.S.C. § 41713 in holding that business tort claims against non-air carriers are not preempted by the ADA.

In support of certiorari, Main St. shows the following:

I. The touchstone for preemption under 49 U.S.C. § 41713 is the subject matter of the claims being asserted, not the identity of the litigants.

It is well settled that preemption ultimately turns on congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In this instance, the Act expressly preempts claims that are related to prices and services of an air carrier. 49 U.S.C. § 41713(b)(1); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390, 112 S.Ct. 2031, 2041, 119 L.Ed.2d 157 (1992). This Court has repeatedly held in favor of construing the plain meaning of the statutory language and finding that the ADA preemption clause is to be broadly interpreted. *See, e.g., Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 128 S.Ct. 989, 994-95 (2008); American Airlines, Inc. v. Wolens*, 513 U.S. 219, 220, 230 (1995); *See also* H.R. Conf. Rep., at 83, U.S.Code Cong. & Admin. News 1994, pp. 1676, 1755 (expressing agreement with "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*"). This Court has recently recognized the "unusual breadth" of ADA preemption. *Altria Group, Inc. v. Good*, --- U.S. ----, 129 S.Ct. 538, 547, 172 L.Ed.2d 398 (2008).

A state claim is preempted where "(1) Congress expressly preempts state law; (2)

Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of federal objectives." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983); *Hodges v. Delta Airlines*, Inc., 44 F.3d 334, 335 n.1 (5th Cir. 1995) (citing *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)).

In this case, American is seeking to employ state law claims (in lieu of pursuing its administrative remedies) in order to enhance the efficacy of its frequent flier program.

American claims that the actions of the defendants in this case harm it because revenues are diverted, and it is forced to carry passengers for whom it has not received its full measure of revenue, in turn displacing or raising the price of paying passengers (an ipso facto admission that the alleged acts of defendants' significantly impact the prices and services of American.) (Pet. App. 32A ¶ 2, 47A ¶ 122).

American further complains of travel agents and brokers setting a price for AAdvantage miles and tickets, and it alleges it is harmed by loss of fares and dwindling seat availability for other passengers. *Id.* Such causes of action sounding in tort could not more clearly relate to "prices" and "services" of an air

carrier. If the alleged conduct made the subject of the suit "relates to" the areas of preemption under the Act, state law claims based on that conduct are preempted. *American Airlines v. Wolens,* 513 U.S. 219, 226 (1995).

In this case, the Texas court has authorized American's employment of state created remedies to restrict and discourage actual and potential competition, and to stifle efforts by ticketing agents and others in the travel industry from being innovative and delivering low prices for air transportation services. *See e.g. Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215 (Tex. App. --Fort Worth 2009, pet. denied). Such holding is contrary to this Court's instruction in *Wolens*, and Congress' intent to insure that "maximum reliance on competitive market forces would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (citing 49 U.S.C.App. §§ 1302(a)(4), 1302(a)(9)).

In the absence of clarification from this Court, lower courts continue to struggle with the scope of preemption under the ADA. For instance, the Second Circuit has focused on the meaning of "related to" in the ADA preemption statute. *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77, 82-84 (2d Cir. 1997).

That court observed that " [r]elated to appears to be developing, to some degree, to mean whether state law actually 'interferes' with the purposes of the federal statute, in this case airline deregulation." *Id.* at 82.

The Sixth Circuit joined the Second Circuit's preemption analysis. *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999).

The Ninth Circuit sat *en banc* to address the reach of the ADA preemption statute. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998). In *Charas*, passengers sued airlines, under both tort and contract theories, for injuries obtained during flights. *Id.* at 1261-62. The Ninth Circuit held that the ADA preempts "only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry." *Id.* at 1261.

The Third Circuit has followed the Ninth Circuit's ADA preemption analysis. *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998).

The Fifth Circuit and Seventh Circuit, relying on this Court's ruling in *Wolens* have adopted far more expansive interpretations of preemption. *See Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282,

287 (5th Cir. 2002); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608-9 (7th Cir. 2000); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 775 (7th Cir. 1989).

American freely admits that the state claims for unfair business practices it seeks to bring as a plaintiff, would be preempted if brought against it whether as a claim or counterclaim. (Brief App. 23A, n.2)

Generally, claims of unfair business practices that relate to the rates, routes, or services of an airline are preempted. *See e.g. American Airlines v. Wolens*, 513 U.S. 219, 228-29; *Buck v. American Airlines, Inc., 476 F.3d 29, 38* (1st Cir. 2007); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 34 Fed. R. Serv. 3d 601 (7th Cir. 1996); *Ex parte Delta Air Lines, Inc.*, 785 So. 2d 327 (Ala. 2000); *Monzingo v. Alaska Air Group, Inc.*, 112 P.3d 655 (Alaska 2005); *Weber v. Moses*, 938 S.W.2d 387 (Tenn. 1996); *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 522 n. 7 (5th Cir. 2002); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1252 (6th Cir.1996); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 540-41 (7th Cir. 1993). Yet, American argues, and the Texas court in this case agreed, that American is free to bring those same preempted tort claims as a plaintiff, because the preemptive provisions of the Act do not reach American in its

capacity as plaintiff. (Brief App. 21A, 23A)(Pet. App. 8A).

American's argument is that the identity of the litigant, rather than the subject matter of the claim triggers preemption, and thus, its claims are not preempted.

In *Rowe v. New Hampshire Motor Transport Ass'n,* 552 U.S. 364, 128 S.Ct. 989 U.S. (2008) this Court recently held that claims are preempted when a state law claim has a " significant impact" on "prices and services." *Id.* Interpreting *Rowe*, one trial court has already held if the state law claims are preempted, "[t]he identity of the plaintiff is irrelevant." *Travers v. JetBlue Airways Corporation,* Slip Op., 2009 WL 2242391 at*2 (D. Mass. 2009). The Texas court in this case, held the opposite. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215 (Tex. App. --Fort Worth 2009, pet. denied). Main St. contends that it "[n]othing in the ADA suggests that [preemption] applies only to suits against an air carrier" and "it is preposterous to assume Congress intended" such. *Marlow v. AMR Services Corp.* 870 F. Supp. 295 (D. Hawaii 1994). As a result, preemption turns on the nature of the claims made, not the identity of the party making them.

This Court's guidance is required to clarify

whether preemption under the ADA turns on the identity of the litigants, or the subject matter of the claims. There are clearly state law claims, such as those advanced by American in this case, which would have a "significant impact," on airlines' prices and services. American stipulates as much in its pleadings. (Pet. App. 32A ¶ 2, 47A ¶ 122).

American's rationale for arguing that identity of the litigant dictates preemption is that the preemption provisions of the Act are designed to afford airlines special protections which are not available to non-airlines. (Brief App. 23A). Main St. however avers that claims are preempted if they "relate to" the prices, routes or services of an air carrier. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 287 n.8 (5th Cir. 2002).

Trial courts have struggled with American's contention that the identity of the litigant dictates preemption. " . . . in the Court's view, it is preposterous to assume that Congress intended to block the prosecution against air carriers of certain suits but to allow those same suits to proceed against all others." *Continental Airlines v. American Airlines,* 824 F. Supp. 689, 697 (S.D. Tex. 1993). In *Travers v. JetBlue Airways Corporation,* the trial court reasoned that the ADA preemption analysis must focus on the effect of the state law on the airline's "services and rates," and that "[t]he identity of the

plaintiff is irrelevant." *Travers v. JetBlue Airways Corporation,* Slip Op., 2009 WL 2242391 at*2 (D. Mass. 2009). Indeed, the statute itself is not limited to airlines, and references claims brought against direct air carriers, indirect air carriers, and ticketing agents, in addition to other persons against whom state tort claims are preempted. *See e.g.* 49 U.S.C. § 41712 (2008). There is no mention of preferential treatment for an airline.

To hold that the Act applies only to claims made against air carriers, and not claims made by air carriers, neglects the clear and express provisions of the Act. To hold that only claims of non-air carriers are preempted, while claims made by air carriers are not preempted requires an explicit abandonment of the express directives of the Act, and a rejection of the most basic principles of statutory construction. It is the subject matter of the claims, rather than the identity of the individual litigant, that Courts are to examine to determine whether that "law. . . or other provision" being enforced is "related to a price, route, or service of an airline." *See* 49 U.S.C. § 41713; *Continental* at 697.

Certiorari is warranted to resolve and clarify that the touchstone for preemption under 49 U.S.C. § 41713 is the subject matter of the claims being asserted, not the identity of the litigants.

II. **This case presents an opportunity for the Court to establish factors to consider in determining whether a claim meets the significant impact test for preemption, such that the claim is not too tenuous or remote to invoke preemption under the ADA.**

Mr. Justice Breyer, in *Rowe,* explained that :

> *Morales* said that federal law might not pre-empt state laws that affect fares in only a 'tenuous, remote, or peripheral . . . manner,' . . . But the Court did not say where, or how, 'it would be appropriate to draw the line . . .

128 S.Ct. at 995.

Courts continue to struggle with "where or how it would be appropriate to draw the line" in regard to characterizing claims as too tenuous remote, or peripheral to escape preemption. This case is uniquely situated to permit this Court to articulate a test that may be applied to determine when claims are too tenuous, remote, or peripheral to be preempted, and to determine when claims significantly impact airlines' rates, routes, or services so as to trigger preemption.

In *Rowe v. New Hampshire Motor Transport Ass'n*, this court explained that:

> . . . federal law does not pre-empt state laws that affect rates, routes, or services in "too tenuous, remote, or peripheral a manner." *Morales*, 504 U.S., at 390, 112 S.Ct. 2031 (internal quotation marks omitted). And we have written that the state laws whose "effect" is "forbidden" under federal law are those with a " significant impact" on carrier rates, routes, or services. *Id.*, at 388, 390, 112 S.Ct. 2031 (emphasis added)

552 U.S. 364, 128 S.Ct. 989, 997 (2008).

Trial courts applying this test have determined that an amount as small as "the airline's imposition of a $2 fee" is not so small that it would avoid preemption. *Brown v. United Air Lines, Inc.*, 656 F. Supp. 2d 244 (D. Mass. 2009).

Without a clear test to determine whether claims are "too tenuous, remote, or peripheral," and even after the pronouncement of the significant impact test, lower courts have struggled to define the limits of preemption. For instance, in *Wolens*, this court extended preemption to claims involving frequent flier programs. Likewise, in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889

F.2d 751, 775 (7th Cir. 1989) the Seventh Circuit held that claims relating to discounted tickets were preempted. Nevertheless, trial courts struggling with the limits of preemption have held that claims related to discount airfare coupons are not preempted. *Cont'l Airlines, Inc. v. Weiner*, 1999 U.S. Dist. Lexis 16377 at *15 (C.D. Cal. 1999). Post-*Rowe*, in *Alaska Airlines, Inc. v. Carey*, Slip Copy, 2009 WL 777391 at *2 (W.D. Wash. 2009) the court held that state law claims against a ticket broker were too tenuous or remote when they did not have "an adverse effect on airline competition." *Id.* The *Carey* court failed to address the significant effect test at all, thus reinforcing the need for clear guidance from this Court.

Trial court decisions applying the *Rowe* significant impact test have not yet reached appellate review. However, there is little doubt from the opinions that exist that the *Rowe* significant impact test is being interpreted to expand the scope of preemption under the ADA. As an example, in *DiFiore v. American Airlines, Inc.*, 483 F. Supp.2d 121, 125-26 (D. Mass. 2007) the court held that tip claims made by skycaps were not preempted because the relationship between a $2 fee and an airline's "price, route, or service" was "too tenuous to support preemption." However, post-*Rowe*, in *Brown v. United Air Lines, Inc.*, 656 F. Supp.2d 244 (D. Mass. 2009), and *Travers v. JetBlue Airways Corp.*, 08-

10730, 2009 WL 2242391, at *2 (D. Mass. 2009) the same claims involving the same fees were found to be preempted following this Court's pronouncement of the significant impact test.

Without additional guidance, litigants and courts will continue to struggle with "where or how it would be appropriate to draw the line" in regard to preemption under the significant impact test as it pertains to ADA preemption. This case provides an opportunity for the Court to provide that much needed guidance to a body of jurisprudence that fundamentally effects one of the largest and most sensitive industries in the country, to wit: the travel industry.

III. This case presents an opportunity for the Court to determine whether the comprehensive administrative remedies promulgated by Congress allowing air carriers to bring administrative complaints against ticket agents, indicates that Congress intended to preempt matters within the scope of available administrative remedies.

Main St. avers that American's claims are 1) expressly preempted under the Act; 2) are preempted because of the regulatory scheme in place; and 3) because they would otherwise interfere with the achievement of federal objectives by state regulation

of the travel industry, including frequent flier programs.

Under the Act, the Secretary of Transportation is directed to promulgate regulations, maintain uniform standards nationwide, and to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation." 49 U.S.C. § 40101(a)(9). Likewise, the DOT is charged with "encouraging, developing, and maintaining an air transportation system relying on actual and potential competition (A) to provide efficiency, innovation, and low prices; and (B) to decide on the variety and quality of, and determine prices for, air transportation services." 49 U.S.C. § 40101(a)(12).

As the Fifth Circuit explained in *Lyn-Lea*:

> While some airline business dealings undoubtedly do not "relate to" prices, routes and services, the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns.

283 F.3d at 288.

When Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme the state claim is preempted. *Shaw*, 463 U.S. at 95. Congress expressly stated a method for regulation over disputes related to unfair competition and unfair or deceptive practices between carriers and ticket agents, to wit: the air carrier can complain to the Secretary of Transportation who investigates and issues order. 49 U.S.C. § 41712.

The Act expressly preempts claims "related to price, routes, or services of an air carrier" and any claims for which an administrative remedy under "this subpart" is provided. 49 U.S.C. §41713 (2008). In said subpart, the Act provides an administrative remedy for complaints made by an air carrier, including airlines, against other air carriers or ticket agents. *See* 49 U.S.C. §41712 (2008).

> On the . . . complaint of an air carrier . . . the Secretary may investigate and decide whether [a] . . . ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.

49 U.S.C.A. § 41712 (2008).

Title 49, Subtitle VII, Part A, subpart i, Chapter 401, §40102 defines "air carrier" and "ticket agent" as follows:

> (2) "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.
>
> * * *
>
> (45) "ticket agent" means a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.

49 U.S.C. §40102 (2008) [Emphasis added].

Main St. is alleged by plaintiff to be a "ticket agent" within the meaning of the Act by virtue of the Airline Reporting Agreement (ARA) and American's Addendum To The ARC. (Brief App. 2A-3A at ¶ 9, 7A-9A, 17A at ¶ 79). Main St., on behalf of American, is alleged to have sold, offered for sale, negotiated for, arranged, booked reservations for, and directly issued tickets for air transportation, (Brief App. *Id.* American further alleges that Main St. was its agent pursuant to the ARC and American's Addendum to the ARC during the relevant time period. (Brief App. 2A at ¶ 9, 7A at¶30).

It is undeniable from a plain reading of American's pleading that all tortious acts and omissions alleged to have been committed by Main St. and Frequent Flyer Depot in this case were allegedly committed while engaged in the selling, offering for sale, negotiating for, or holding themselves out as selling, providing, or arranging for, air transportation. The crux of American's claims is that the defendants fraudulently arranged for air transportation. (See Brief App. 17A at ¶¶ 82, 83; Pet.App. 41A-45A at ¶¶ 101, 105, 108, 109, 113, 114, 117; 45A at ¶ 122).

Because it is those alleged actions, averred to constitute wrongfully "arrang[ing] for air transportation," that form the basis of American's tort claims, such claims are squarely under the umbrella of preemption. When party engages in such actions, either on its own as a principal (Frequent Flyer Depot), or in its capacity as an agent for the airlines (Main St.), that party is a ticketing agent under the Act and a comprehensive administrative remedy is available to an aggrieved party. Accordingly, preemption under the ADA applies to claims made against such a party. 49 U.S.C. §41713 (2008); 49 U.S.C. §40102 (2008).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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No. 067-224132-07

AMERICAN AIRLINES, INC.

v.

REQUENT GLYER DEPOT, INC., GEORGE PIRKLE, ROBERT PIRKLE, LTS, LUXURY TOUR SOURCE, LTD., MUKESH KUMAR GOYAL, MAIN ST. TRAVEL CENTER OF MONSEY, INC., BEN WEBER, ISRAEL ODZE, AND JOHN DOE I.

IN THE JUDICIAL DISTRICT OF
TARRANT COUNTY, TEXAS
67TH JUDICIAL DISTRICT

PLAINTIFF'S THIRD AMENDED PETITION

[Paragraphs 1-6 are omitted as they are included in Petitioners Appendix; Paragraphs 7 and 8 are omitted as they are not relevant to the issues.]

Parties

9. Defendant Main St. Travel Center of Monsey, Inc. ("Main St.") is a New York corporation. It has been served with process and has filed a special appearance. It has operated primarily as a travel agency engaged in the sale, among other

things, of airline tickets, and has participated in booking reservations and/or issuing tickets for passengers for flights on American, pursuant to a written contract known as the American Airlines Addendum to the ARC Agent Reporting Agreement, which has a jurisdiction selection clause pursuant to which Main St. submitted to the jurisdiction of the courts of the State of Texas for this dispute.

10. Defendant Ben Weber ("Weber") is an individual whose office address is 71 Route 59, Suite B, Monsey, New York, 10952. He has been served with process and has filed a special appearance. He is President of Main St.

11. Defendant Israel Odze (a/k/a Yisroel Odze) ('Odze") is an individual whose residential address is 481 Crown Avenue, Apt. A10, Brooklyn, New York, 11225. Service of process on him at this address has been unsuccessful. He is an agent or representative of Main St.

[Paragraph 12 is omitted as it is not relevant to the issues; Paragraphs 13-14 are included in Petitioners' Appendix.]

Jurisdiction and Venue

15. This Court has personal jurisdiction over defendant Main St. because it submitted to jurisdiction in the Courts of Texas for this dispute,

has continuous and systematic contacts with Texas, and purposefully availed itself of the privilege of doing business in Texas. Specifically, Main St. admits it is bound by the terms and conditions of the Airlines Reporting Corporation Agent Reporting Agreement ("'ARC Agreement") and the American Airlines' Addendum to the ARC Agreement (['the Addendum"), pursuant to which Main St, agreed that disputes, such as this, arising out of the Addendum are to be submitted to the courts of the State of Texas.

16. This Court has personal jurisdiction over defendant Weber because he has continuous and systematic contacts with Texas and purposefully availed himself of the privilege of doing business in Texas. Specifically, Weber admits as president of Main St. he reached out to American in Texas by telephone and email to do business with it, was dealing with American on a daily basis, and the financial benefits reaped by that business would benefit him personally in the long run. However, Weber failed to disclose to American that Main St. was defrauding the AAdvantage program.

[Paragraphs 17 and 18 are omitted as they are not relevant to the issues; Paragraph 19- 20 are included in Petitioners' Appendix; Paragraphs 21-22 are not relevant to the issues.]

Facts Giving Rise to This Action

B. The ARC Reporting Agreement

A. American's Efforts to Protect Its Property

23. Over the last 75 years, Fort Worth-based American has grown to be the largest commercial airline in the world, with the greatest number of passengers carried, the most revenue passenger miles flown, and the largest fleet of planes.

24. American's AAdvantage frequent flyer program is designed to develop passenger loyalty and increase revenues by rewarding its best customers those who regularly fly American. It is the oldest and most used frequent flyer program in the industry Membership is limited to individuals.

25. In exchange for adhering to the AAdvantage contract that sets out the rules the program and its members, members accrue mileage credit by flying on American or its partner airlines, staying at hotel partners, renting a car from a partner company, or by other means. Mileage credit accrues only to the account of the member who flies, stays at a hotel, rents a car, or earns it by other lawful means. In consideration for accumulating specified mounts of mileage credit, members earn award tickets for free travel on American or its

partner airlines, upgrades to a higher class of service, and other benefits. AAdvantage award tickets and upgrades may be issued in any name designated by the AAdvantage member at the time the request is made.

26. The AAdvantage contract is made available to members and the public in several written forms, including in the program application and on American's website, AA.com. The rules in the AAdvantage contract state, "accrued mileage credit and award tickets do not constitute property of the members." They belong to American. American protects them by prohibiting their purchase, sale, or barter and enforcing penalties for violations, a term known as the "No-Sale Rule." Specifically, (i) "Any such mileage or tickets are void if transferred for cash or other consideration"; (ii) "Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding"; and (iii) "If a trip has been started, any continued travel will be at the cost of a full fare ticket for any segments flown on a sold or bartered ticket."

27. American seeks to enjoin and recover damages resulting from defendants' widespread violations of the No-Sale Rule.

B. The ARC Reporting Agreement

28. The Airlines Reporting Corporation ("ARC") is an airline-owned company serving the travel industry in the United States, Puerto Rico, and U.S. Virgin Islands. ARC provides ticket distribution, reporting, and settlement services for over 145 air and rail carriers and more than 20,000 ARC-accredited travel agencies and corporate travel departments.

29. To become ARC accredited, a travel agency must meet, and continue to meet, certain minimum requirements and qualifications, including financial requirements and personnel standards. The agency also must enter into a contract with ARC known as the Agent Reporting Agreement ("ARC Agreement"). An ARC-accredited agency is bound by the terms and conditions of the ARC Agreement and its addendums.

30. The ARC Agreement effectively appoints the ARC-accredited travel agency as an agent for the various airlines -- including American -- that have a contractual relationship with ARC in the sale of air transportation. Thus, for an agency like Main St. to be authorized to issue tickets and upgrades for travel on American, it must enter into the ARC Agreement, which includes the terms and conditions set forth in the American Airlines Addendum to the Agent Reporting Agreement ("Addendum").

31. The Addendum covers all travel agencies in the United States acting for American that have entered into the Agent Reporting Agreement with ARC. It is intended to, and does, clarify the agency's responsibilities and duties under the ARC Agreement. The agency's continued sale of air transportation on American evidenced its and American's mutual agreement to the terms and conditions contained in the Addendum.

32. Addendum § 3(a), Compliance with American's Rules and Rates, states:

Agent shall strictly adhere to American's current instructions, rules, regulations,requirements, conditions of sale or carriage, tariffs, and procedures (the "Rules") in booking any reservation *or* issuing, reissuing, selling, exchanging, refunding, or reporting any ticket calling for transportation on American. Failure to comply subjects Agent to debit memos from American for an amount equal to either the cost of the ticket, the difference between the fare paid and the applicable fare, or an administrative service charge, as American deems appropriate, and termination of Agent's appointment.

33. Addendum § 3(b), Advantage®/Promotional Programs, states:

Agent agrees to comply with all Rules governing the AAdvantage Program and, other promotional programs, including the issuance of promotional certificates and tickets. Agent acknowledges that the purchase, sale, or barter of promotional or AAdvantage® awards, mileage, or tickets (other than a purchase from American) is strictly prohibited and that Agent's direct or indirect involvement in any of these activities subjects Agent to (1) debit memos for the applicable fare or any losses sustained by American due to this activity, (2) termination of Agent's appointment, and (3) legal or equitable remedies.

34. Addendum § 5(a), Issuance of Debit Memos, states:

If Agent issues a ticket in violation of the ARC Agreement or this Addendum, American may issue a debit memo to Agent for any deficiency or any loss incurred by American by reason of the violation.. ..American also retains all rights and remedies available to it under the ARC Agreement or at law or in equity.

35. Addendum 5 S(b), Payment of Debit Memos, states:

Agent agrees to pay or reconcile all debit memos issued by American within 30 days of the date of issuance. If Agent fails to do so, American reserves the right to assess, and Agent *agrees* to pay, interest on the past due amounts at a rate not to exceed one and one-half percent (1 1/2 %) per month, compounded monthly, or the maximum rate permitted by law, whichever is less, &om the date due to the date of the payment.

36. The Addendum has a jurisdiction selection clause pursuant to which ARC-accredited travel agencies consent to the jurisdiction of the courts of the state of Texas for all disputes between American and the agent arising out of the ARC Agreement or the Addendum. Specifically, Addendum $ 10(c), APPLICABLE LAW, states in all capital letters:

THE LAWS OF THE STATE OF TEXAS AND THE UNITED STATES-OF AMERICA SHALL GOVERN ANY DISPUTES BETWEEN AMERICAN AND AGENT ARISING OUT OF THE ARC AGREEMENT OR THIS ADDENDUM. AGENT HEREBY SUBMITS AND CONSENTS TO THE NON-EXCLUSIVE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AND THE COURTS OF THE

STATE OF TEXAS FOR ALL THESE DISPUTES.

37. At all relevant times, Main St. was an ARC-accredited travel agency bound by the terms find conditions of the Agent Reporting Agreement and the Addendum, including the jurisdiction selection clause pursuant to which it submitted to the courts of the State of Texas for disputes arising out of the ARC Agreement and Addendum.

C. Defendant FFD's Wrongful Conduct

[Paragraphs 38-54 are omitted as they are included in the Appendix of Petitioner.]

E. Defendant LTS's Wrongful Conduct

55. LTS is in business to buy AAdvantage mileage credit and award tickets from AAdvantage members and then sell the wrongfully-obtained award ticket to American's potential customers, all without compensation to American. It operates with knowledge that under the AAdvantage rules neither mileage credit nor award tickets may be purchased, bartered, or sold, and that the mileage and tickets are void if transferred for cash or other consideration. LTS's actions are calculated to target end injure the AAdvantage program.

56. LTS operates its deceptive schemes through numerous websites. Some are for travelers

looking to buy American's most profitable tickets, first and business class, such as www.LuxuryTravelSource.com, www.WiseFlyer.com, www.DiscountTravelBrokers.com, and www.ExecutiveTravelBrokers.com. One site, www.SellYourPoints.com, is designed to induce AAdvantage members to sell their mileage credit in violation of the No-Sale Rule. At other LTS websites, www.FirstClassTickets.com and www,Mileageking.com, users can either purchase airline tickets for first-class and business-class seats or sell their mileage credit.

57. Through these websites, LTS targets its customers. Prospective buyers complete and submit a questionnaire with their contact information and desired itinerary. They are asked to choose the highest price they are willing to pay for a ticket, permitting LTS to price its tickets to maximize profits. It advertises its sale of wrongfully-obtained tickets on other sites, including Official Travel Industry Directory (www.otid.com), JaxFax Travel Marketing (www.jaxfax.com), and TravelAgent Newsweekly (www.advanstars-web-support.com/PRODUCTS/TAM/prod2537.html).

58. Despite its knowledge of the No-Sale Rule, none of the LTS sites disclose that the tickets are void because they are award tickets that were purchased and sold.

59. Likewise, the LTS websites misrepresent the propriety of selling mileage credit and award tickets. Its SellYourPoints.com website states, "There is no federal or state law restricting the sale, bartering or transfer of miles in 49 or the 50 states (Utah being the exception)," and a disclaimer on its MileageLink.com website states, "It is totally legal to transfer miles to a third party. While the airline frowns upon the 'selling' of miles and certificates, it is currently being done around the world."

60. Once LTS matches a buyer and a seller, it calls or causes a call to be made to American reservations -- including call centers in this State -- to reserve the ticket in the name of its customer, the buyer. LTS induces the seller, an AAdvantage member, to use his mileage credit to make a reservation with American in the name of the LTS customer, while conceding the fact that the ticket will be sold. American, without knowledge of this fact, issues the requested award ticket. LTS pays the seller for the mileage credit and then sells the ticket to its buyer. American receives no consideration in the transaction.

61. LTS has induced AAdvantage members -- including Texas residents -- to sell their mileage credit or award tickets to LTS, in violation of the No-Sale Rule; to contact American reservations to request issuance of award tickets in the names of

individuals to whom LTS will wrongfully sell the tickets; and to conceal from American their intention to sell the mileage credit and award tickets to LTS.

62. By way of example, one AAdvantage member residing in Dallas sold LTS award tickets processed on Aug. 19, 2005, Nov. 13, 2005, Dec. 20, 2005, and Jan. 9, 2007. Another residing in Irving sold LTS an award ticket processed on Mar. 15, 2006.

63. LTS sent an email to an AAdvantage member on May 14,2007 advising that he lie to inquiries from American, by fraudulently misrepresenting that LTS "provides a service to you where by [sic] they set up reservations for you so that you can use your frequent flyer miles. It has become so difficult to find award space on your own that it is worth it to pay a $100 booking fee to this company to set things up for you."

64. LTS has made misleading statements to induce those who purchased the wrongfully obtained AAdvantage award tickets to believe that they had received valid airline tickets good for travel on American or its partner airlines, despite its knowledge that award tickets are void once purchased or sold.

65. Numerous individuals have traveled on American or its partner airlines using void award tickets wrongfully sold by LTS. They likely would

have purchased tickets from American had they not obtained the void award tickets from LTS. Furthermore, they likely displaced other potential AAdvantage members or American customers who would have purchased tickets from American, had the seats occupied by travelers with void award tickets been available.

66. LTS has wrongfully purchased at least 55,715,000 AAdvantage mileage credits and wrongfully obtained at least 492 award tickets valued at more than $4.6 million. American has paid to transport these passengers without compensation in first-class and business-class seats, its most profitable service.

67. In addition, LTS wrongfully obtained five award tickets that American did not honor for travel because it determined that the tickets had been sold and thus were void.

68. American has lost goodwill with AAdvantage members prevented from obtaining free award travel on American because the seats were occupied by individuals using wrongfully obtained tickets, and with the general public who paid higher prices to American for valid tickets than those offered by LTS for wrongfully-obtained tickets. American also has been forced to expend significant resources to investigate LTS's improper activities.

69. Because AAdvantage mileage credit and award tickets are highly valuable, and because LTS's sole business purpose is to buy, sell, and barter them, it is likely that LTS will continue to wrongfully barter and sell mileage credit and award tickets.

70. In addition, LTS improperly trades on American's goodwill 'and reputation in promoting its business and attracting consumers to its websites. Specifically, the homepage of www.SellYourPoints.com prominently displays an American logo under the heading: "We buy miles from the following carriers." A page on the LuxuryTravelSome.com website displays an American logo next to text that describes first-class and business-class travel on American flights. FirstClassTickets.com displays an American logo under the heading "Featured Airlines."

F. Defendant Mukesh Kumar Goyal's Wrongful Conduct

[Paragraphs 71-77 have been omitted]

G. Defendants Main St.'s, Weber's, and Odze's Wrongful Conduct

78. Main St., Weber, and Odze engaged in a scheme to broker AAdvantage mileage credit and award tickets to American's potential customers, all without compensation to American. They did this

with knowledge that neither mileage credit nor award tickets may be purchased, bartered, or sold, and the mileage and tickets are void if transferred for cash or other consideration. Their scheme is calculated to target and injure the AAdvantage program.

79. Main St. was an ARC-accredited travel agency. Based on its actions in violation of the Addendum, American issued a debit memo to it in the sum of $1,763,133.87 on January 31, 2007, which Main St. has failed to pay, in further violation of the Addendum. American terminated its appointment as its agency.

80. Weber is President of Main St. He has detailed knowledge of its wrongful operations k d personally directed, authorized, and participated in them.

81. Odze acted as an agent of Main St. It granted him access to its computerized international air travel reservation system (i.e., SABRE) and assigned a sign-in access code/name to him so he could act on its behalf.

82. Main St., Weber, and Odze brokered, purchased, and sold thousands of fraudulently-obtained AAdvantage mileage credit for hundreds of award tickets and upgrades. With SABRE access, Odze made reservations for travel on American using

wrongfully-obtained mileage credit.

83. To carry out their scheme, Main St., Weber, and Odze induced AAdvantage members -- including Texas residents -- to sell their mileage credit or award tickets to them, in violation of the No-Sale Rule and the Addendum; to request from American issuance of award tickets in the names of the individuals to whom they wrongfully sold the tickets; and to conceal from American their intention to sell the mileage credit and award tickets to defendants.

84. They induced customers that purchased wrongfully-obtained AAdvantage award tickets and upgrades to believe that they had received valid airline tickets good for travel on American or its partner airlines, despite their knowledge that award tickets and upgrades are void once purchased or sold.

85. Because AAdvantage mileage credit and award tickets are highly valuable, and because Main St., Weber, and Odze wrongfully buy, sell, and barter them, it is likely that they will continue to do so.

[Paragraphs 86-96 are omitted as they are not relevant to the issues. Paragraphs 97-127 and the "Prayer for Relief" section are omitted as they are included in Petitioner's Appendix.]

Respectfully submitted,
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NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC. et al.

IN THE DISTRICT COURT
67th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

MOTION TO DISMISS

Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle ("FFD defendants"), Luxury Travel Source and Mukesh Kuhmar Goyal ("LTS defendants"), and Main St. Travel Center of Monsey, Inc. and Ben Weber ("Main St. defendants") (jointly referred to as the "Moving defendants") move to dismiss American Airlines' non-contract claims against them on the grounds that such claims are preempted by the Airline Deregulation Act of 1978.

[The remainder of the Motion is omitted.]

NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC. et al.

IN THE DISTRICT COURT
67th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

AMERICAN'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants ask the Court to do what no other court has done: dismiss an airline's state law claims against entities that are not "air carriers," as preempted under the Airline Deregulation Act of 1978 ("ADA"). The motion is as legally flawed as it is ironic.

Courts around the country *that* have addressed ADA preemption have rejected the upside-down position argued by Defendants. Their misguided theory ignores the Act's purpose -- to prevent re-regulation of *airlines* -- and its plain language, which prohibits states *from* enforcing laws "related to a price, route, or service of an *air carrier*." 49 U.S.C. 41713 (b)(1) (emph. added). Quite simply, American's claims do not relate to prices, routes, or services "of an air carrier" because Defendants indisputably are not airlines. On the contrary, their business of illicitly brokering frequent-flier miles and award tickets injures airlines, like American, which are burdened with the

cost of carrying unauthorized no-revenue passengers.

Because American's claims fall outside the scope of ADA preemption, the motion should be denied on its merits. In addition, as a procedural matter, the motion should be denied because it is not presented as a motion for summary judgment, with its usual prerequisites.

Pertinent Background

This suit is to end chronic frequent flyer fraud against the AAdvantage® travel rewards program. American operates the program to generate customer goodwill and sales by providing value to its best flyers through recognition and rewards. In exchange for adhering to the AAdvantage contract that sets out the program's terms and conditions -- including the No-Sale Rule prohibiting the sale, purchase, or barter of miles and awards -- members accrue miles that can be redeemed for free travel on American and its partner airlines. *See* 3rd *Am.* Pet. ¶¶ 25-26. Defendants are non-airlines that profit off of American (and other air carriers) by selling frequent flier award tickets to American's potential customers, with no payment to American and in direct violation of the No-Sale Rule. *See* id ¶¶ 38-85.

Defendants have injured American by diverting revenues it should have received, burdening it with the cost of providing unearned free air travel, and causing it to lose goodwill with AAdvantage members and the traveling public. American seeks redress under state law for defendants' fraud, interference, and

misappropriation, as well as damages and injunctive relief to end their chronic fraud. *See id* ¶¶ 96-99; 101-19; 122-23; 128-34.

[Pages 2-5 are omitted]

1. Defendants are not air carriers providing airline services

[Paragraph omitted]

The ADA does not prevent an airline from taking proper legal action under state law against those who wrongfully injure it. Neither the Act's language nor its intent supports defendants' misguided theory of preemption. Rather, the ADA's preemption scheme sought to eliminate issues like the pricing anomalies that airlines faced when subject to overlapping federal and state regulation. See H.R. Rep. No. 95-1211, at 15-16. American's claims do not relate to prices, routes, or services "of an air carrier" because defendants are not airlines.[2]

[2] In contrast, Defendants' state law counterclaims against American are subject to *ADA* preemption because they relate to the prices and services of American an air carrier. On this basis, American will file a motion for summary judgment of these claims.

[The remainder of the motion is omitted.]